BEFORE THE
ILLINOIS COMMERCE COMMISSION

In the Matter of	**)**	
	)	
Petition for Arbitration of XO ILLINOIS,	**)**	
INC. Of an Amendment to an	**)**	**Docket No. 04-0371**
Interconnection Agreement with SBC	**)**	
ILLINOIS, INC. Pursuant to Section	**)**	
252(b) of the Communications Act of 1934,	**)**	
as Amended	**)**	

XO ILLINOIS' RESPONSE TO THE APPLICATION FOR REHEARING OF SBC ILLINOIS

XO Illinois, Inc. ("XO") provides the following response to the Application of Illinois Bell Telephone Company ("SBC") for rehearing of the Commission's September 9, 2004, Arbitration Decision ("Application"). The Application is full of sound and fury but signifies nothing. SBC offers no new facts or legal decisions. Rather, SBC largely repeats the arguments it has previously made, as if further repetition will make those arguments any more persuasive. SBC also misconstrues the Arbitration Decision and ignores the impact of issues that SBC itself raised in a futile attempt to justify its Application. Accordingly, the Commission should deny the Application as devoid of merit.

DISCUSSION

A. The Commission Properly Resolved Disputed Issues Concerning the Applicability of Section 271 and State Law.

The Arbitration Decision appropriately recognized that SBC retains a legal obligation to unbundle its network under Section 271 and applicable state law. SBC contends that the

Commission overstepped its bounds in requiring SBC to provide UNEs under Section 271 and state law in this arbitration. SBC incorrectly interprets both the Arbitration Decision and applicable law.

SBC contends that the Commission reached outside this proceeding to impose a legal obligation on SBC that did not previously exist. The truth is far different. SBC, not XO or the Commission, raised in this proceeding the issue of the law governing SBC's unbundling obligations. SBC proposed Amendment language that would *limit* such obligations to the requirements in "lawful and effective" Federal Communications Commission ("FCC") rules implementing Section 251(c)(3) of the federal Telecommunications Act of 1996 ("Act"). Neither the FCC in its *Triennial Review Order* (*"TRO"*)[1] nor the D.C. Circuit in its decision in *USTA II*[2] authorized, much less required, a modification to existing interconnection agreements ("ICAs") to incorporate such a limitation. To the contrary, as the Commission observed, the *TRO* expressly recognizes existing Section 271 unbundling obligations. Arbitration Decision at 67 (citing *TRO* ¶ 653).

SBC thus was the party that proposed to expand the scope of this arbitration beyond the requirements of the *TRO*. The Commission nevertheless permitted SBC to raise this issue. XO responded that SBC's existing unbundling obligations are not limited to FCC rules but derive from multiple sources of applicable law, including Section 271 and state law. This dispute was presented to the Commission for resolution. SBC cannot now claim that this issue was outside the scope of this arbitration simply because the Commission did not resolve the issue in SBC's favor.

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[1] *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003).

[2] *United States Telecom Ass'n v. FCC*, 359 F3d 554 (D.C. Cir. 2004).

Nor can SBC justifiably contend that the Commission somehow adopted new unbundling requirements. The Commission quite clearly stated that it was not "attempting to define the extent to which Section 271 governs the parties' conduct. We are simply saying, in effect, 'incorporate what the FCC said about 271 UNEs into your ICA, and it will have whatever effect the FCC said it will have.'" Arbitration Decision at 66. Similarly, the Commission found that "XO's references to Section 271 and 'state law' would give XO no more than whatever those authorities would provide." *Id*. at 67. The Commission thus did nothing more than to recognize that Section 271 and Illinois law, as well as FCC rules, currently impose unbundling obligations on SBC.[3] SBC certainly is free to participate in other proceedings that address whether Section 271 or state law can and should require SBC to unbundle its network in Illinois,[4] but the Commission properly concluded that existing law should be reflected in the parties' ICA.

B. The Order Correctly Incorporates the Requirements of the *Status Quo Order*.

The Commission determined in response to SBC's urgings that changes in law that occurred during the arbitration, despite the continuing uncertainty they engendered, should be included in the arbitration. SBC now complains about having to reap what it has sown. The

[3] SBC claims that the parties' ICA "*nowhere* requires SBC Illinois to provide unbundled network elements under state law." Application at 7. As the Commission has observed, the ICA is not part of the record in this proceeding and thus there is no basis on which SBC can support this statement. For the Commission's edification, however, Section 19.2 of the ICA provides, "Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, final and nonappealable orders, decisions, injunctions, judgments, awards and decrees (collectively, **"Applicable Law"**) that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law." The ICA thus already reflects the requirements in the Illinois statutes establishing SBC's unbundling obligations.

[4] SBC proposes that the Commission delete a portion of the Arbitration Decision on pages 49-50 explaining why the Commission requires the ICA to reflect existing law. This discussion is not "dicta," but rather a response to SBC's claims that federal law preempts Illinois statutes. The Commission correctly explained that until the Commission or a court of competent jurisdiction rules otherwise in a proceeding that properly presents this issue, those statutes remain effective and binding on the parties and must be incorporated into the ICA.

FCC's *Status Quo Order*[5] raises more questions than it answers, and the Commission has attempted to resolve some of the uncertainties in the manner that is in the best interests of Illinois consumers. SBC provides no basis on which the Commission should alter those determinations.

1. Transition Period

The Arbitration Decision requires the parties to incorporate into their ICA the transition plan that the FCC outlined as part of its *Status Quo Order*. SBC contends that this decision is erroneous because the FCC established this transition plan as only a proposal, not a requirement. SBC repeats its proposal that the Commission authorize SBC to discontinue providing switching and high capacity loops and transport as UNEs immediately upon expiration of the six month interim period on March 5, 2005, if the FCC has not promulgated permanent unbundling rules. The Commission properly rejected that proposal as too draconian and virtually inviting massive disruption of service to consumers served by competing local exchange companies ("CLECs"). Indeed, the FCC expressly cited such concerns in promulgating the *Status Quo Order*.

The nature of the transition plan, moreover, is far from clear. The *Status Quo Order* repeatedly refers to the transition plan as being part of the FCC's "one-year transitional regime," (¶ 2), "two-phase plan . . . over the next twelve months," (¶ 10), and "twelve month transition" (¶ 17). The FCC obviously contemplated that as many as twelve, rather than merely six, months may be necessary to take the actions necessary to adopt permanent unbundling rules – a wise precaution given the FCC's past practice. Whether or not the *Status Quo Order* requires that the transition plan be incorporated into ICAs, the Commission requirement that the parties include it in their ICA is fully consistent with the FCC's intent and with the Commission's concern that consumers not experience service interruption as a result of the turmoil at the FCC. SBC cites no

[5] *In re Unbundled Access to Network Elements*, WC Docket No. 04-313 & CC Docket No. 01-338, FCC 04-179, Order and Notice of Proposed Rulemaking (rel. Aug. 20, 2004).

authority to the contrary and thus has provided no basis on which the Commission should revisit this determination.

2. Unbundling Presumptions

The Commission concluded that FCC final rules maintaining any current unbundling obligations would not be a change of law, but "[a]ny other future FCC *or state* requirement affecting the relevant switching, loop, and transport UNEs *may* constitute a change of law to be addressed by the change-of-law mechanisms." Arbitration Decision at 95 (emphasis added). SBC mischaracterizes this statement as presuming that the FCC will require the unbundling of mass market switching, dedicated transport, and enterprise loops. The Commission makes no such presumption, or any other presumption. Rather, the Arbitration Decision properly requires the parties to amend their ICA to reflect the law as it currently exists, not as SBC anticipates that the law will be in six months.

SBC asserts that the Commission got it backwards – that a change in law will occur if the FCC requires SBC to unbundle on a permanent basis any of the UNEs discussed in the *Status Quo Order.* While consistent with SBC's advocacy, this assertion does not accurately reflect the *Status Quo Order*. The FCC has required SBC to maintain the status quo by continuing to provide certain UNEs under existing terms and conditions for six months with the expectation that the FCC will issue additional orders and/or rules that address those UNEs. SBC's convoluted argument that the *Status Quo Order* is nothing but a band-aid on *USTA II* finds no support in the FCC's order or in common sense. The "status quo" reflects existing conditions. When the status quo changes – *i.e.*, when the FCC alters the legal requirements currently in effect – the parties may or may not need to modify their ICA to reflect that alteration, depending on the nature of the change. The Arbitration Decision properly states exactly that.

SBC nevertheless maintains that the FCC intended that ICA amendments incorporating the *Status Quo Order* presume that the UNEs at issue in that Order would no longer be available at the end of the interim period. SBC's selective quotation from the FCC order does not support that position. The FCC stated in full:

> In order to allow a speedy transition in the even we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, **we do not restrict such change of law proceedings from presuming an ultimate [FCC] holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements**, but under any such presumption, the results of such proceedings must reflect the transitional structure set forth below.[6]

Far from *requiring* the Commission to presume the future unavailability of certain UNEs, the FCC merely *did not prohibit* change of law proceedings from making such a presumption. The Commission correctly made no presumption as to any such elements – a determination that is squarely within the requirements of the *Status Quo Order.* The sole justification that SBC offers for creating such a presumption is that it would permit SBC to discontinue providing certain UNEs faster if and when the FCC finds no impairment. SBC's parochial interests certainly do not take precedence over the public interest in ensuring that consumers are protected from the ever-shifting winds of federal law. As a practical matter, moreover, even if the FCC declines to require that SBC provide certain UNEs, SBC cannot discontinue providing those UNEs until issues of its obligations under Section 271 and state law have been resolved. Accordingly, SBC has failed to state any reasonable grounds on which the Commission should modify the Arbitration Decision on this issue.

[6] *Status Quo Order* ¶ 22 (emphasis added).

3. SBC Proposed Modifications

SBC proposes a variety of modifications to the Arbitration Decision that would incorporate SBC's interpretation of the *Status Quo Order* and SBC's obligations – or more accurately in SBC's view, lack of obligations – under Section 271 and Illinois law. As discussed above, SBC has failed to justify the desirability of, much less need for, these modifications. The Commission, therefore, should refuse to adopt any of SBC's proposed changes to the Arbitration Decision.

C. The Commission Does Not Need to Modify Footnotes That Do Not Affect the Outcome of the Arbitration.

SBC apparently believes that the Commission has nothing better to do than to revisit observations it has made in a footnote to the Arbitration Decision that do not affect the outcome of the arbitration or the language in the ICA Amendment that the parties must develop. Whether *USTA II* vacated the FCC rule requiring unbundling of enterprise loops is academic. The *Status Quo Order* includes enterprise loops, and the Arbitration Decision incorporates the requirements of the *Status Quo Order*. SBC's disagreement with the Commission discussion in footnote 53 does not merit reconsideration of the Arbitration Decision.

The Commission, moreover, correctly interpreted *USTA II*. Nowhere in the D.C. Circuit's opinion does the court state that it vacated the FCC's determination that competitors would be impaired without access to high capacity loops. As the Commission observed, the court vacated only the FCC's subdelegation of impairment findings to the states. SBC argues that the court necessarily included high capacity loops in its vacatur and the Commission's contrary interpretation "defies common sense." SBC's histrionics aside, its arguments amount to nothing more than the unsupported claim that the D.C. Circuit was confused and did not understand what it was saying. Even the FCC was not willing to go so far, but refused to take a

position on the issue.[7] The Commission correctly concluded that the D.C. Circuit meant what it said, and the Arbitration Decision properly reflects that interpretation.

D. The Commission Correctly Incorporated the FCC's Latest EEL Eligibility Requirements.

The Arbitration Decision recognized XO's primary concern with SBC's proposed language governing enhanced extended links ("EELs") that SBC would have required XO to collocate in every central office through which an EEL circuit passes, thus undermining the availability and utility of EELs. The Commission addressed this concern by limited the collocation requirement to an SBC office within the same LATA as the customer premises – which is precisely the language the FCC uses in 47 C.F.R. § 51.318(c)(1) and ¶ 597 of the *TRO.* SBC maintains that this requirement is insufficient, but SBC's argument is with the FCC, not the Arbitration Decision. The Commission, moreover, conditioned its collocation requirement on the fact "that XO will still be subject to the eligibility criteria promulgated by the FCC in the TRO, as incorporated into the parties' ICA." Arbitration Decision at 72. Compliance with these additional criteria will more than adequately ensure that XO is collocated in an appropriate SBC central office in full compliance with the *TRO.*

SBC also takes issue with the Commission's decision to establish consistency between the collocation requirements in the *TRO* and the *Status Quo Order* where the FCC failed to do so. SBC contends that as a matter of law, the *TRO* trumps the *Status Quo Order* on this issue. The law is not nearly so clear, but more importantly, SBC makes this argument in a vacuum. SBC cites no provision of the parties' existing ICA preserved by the *Status Quo Order* that is inconsistent with the EEL collocation eligibility requirement in the *TRO*, nor is XO aware of any inconsistency. In the absence of a specific conflict, therefore, SBC's arguments are moot. SBC

[7] *TRO* ¶ 1, n.4.

thus has failed to identify any basis on which the Commission should reconsider any part of its Arbitration Decision on collocation EEL eligibility requirements.

E. The FCC's Determination on the Availability of Call-Related Databases and SS7 Signaling as Stand Alone UNEs Is Not a Disputed Issue in This Case.

SBC's final assault on the Arbitration Decision is that the Commission allegedly overruled the FCC by not excluding call-related databases and SS7 signaling when not used with SBC's unbundled local switching from the list of "declassified" UNEs. The Commission did no such thing. Consistent with its conclusion throughout the Arbitration Decision, the Commission simply recognized that SBC's unbundling obligations are not limited to those stated in FCC rules implementing Section 251(c)(3) of the Act, but that Section 271 and state law also must be considered. The Commission thus found that it has "not determined that SBC is free of unbundling obligations regarding certain enumerated items in Section 1.3.1.1 (e.g., subsections (x), (xi))." Neither the Commission nor XO has ever taken issue with the fact that the FCC in the *TRO* concluded that these UNEs do not satisfy its impairment standards, but the conclusion does not necessarily mean the SBC is relieved of all obligations to provide those UNEs. SBC disagrees with that position, as SBC repeatedly states, but that disagreement fails to provide any basis for Commission reconsideration of this issue.

CONCLUSION

SBC has offered no new evidence, legal authority, or any other basis on which the Commission should rehear or otherwise modify the Arbitration Decision. The Commission, therefore, should deny the Application.

Respectfully submitted this 15th Day of October 2004.

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